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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NELIDA N. CRUZ, Defendant and Appellant.	E030490 (Super.Ct.No. FBA5813) OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Vander Feer, Judge. Affirmed.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil P. Gonzalez, Supervising Deputy Attorney General, Sharon L. Rhodes, Deputy Attorney General, for Plaintiff and Respondent.

Defendant appeals her convictions for two counts of torture (Pen. Code, § 206)[1] and two counts of child abuse resulting in great bodily injury (§§ 273a, subd. (a), 12022.7, subd. (a)). Defendant argues that (1) the jury should have been informed that the father of the children she was accused of abusing had exercised his Fifth Amendment privilege against self-incrimination in regard to questions about whether he disciplined the children, and (2) the jury was mislead by an instruction that "persuasion," as required for torture, has its common meaning. We affirm, concluding that (1) the law generally prohibits informing a jury that the privilege against self-incrimination has been invoked and there is no reason to depart from that rule in this case, and (2) there was nothing misleading about the common meaning of persuasion.

STATEMENT OF FACTS

The two child victims lived with their mother in Tennessee until September 1999, when their mother was diagnosed with cancer and sent them to live with their father in California. The boys were 10 years old and seven years old at that time.

The father and the boys moved in with defendant. That fall, the mother kept in touch with the boys by calling them on the telephone every week. They initially seemed happy and talkative, and told her about everything they were doing. Furthermore, when the boys came back to Tennessee to spend Christmas with their mother they seemed happy and well cared for. After Christmas, however, their mother noticed that the boys

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[1] All further statutory references will be to the Penal Code unless otherwise indicated.

[footnote continued on next page]

had changed. During telephone conversations, they merely answered her questions without volunteering any information.

The boys testified that before Christmas, their father was usually home with them and defendant treated them well. But after Christmas, their father went back to work for the military and was frequently gone. At that point, defendant began abusing them in their father's absence.

The boys claimed that defendant hit them with various objects, including a plastic toy rake, a belt, a hairbrush, a hanger, and an extension cord, but she used wooden drumsticks the most. At times, defendant tied them up or sat on them and hit them. Defendant made them lay down on their back and hold their feet up in the air, and if they let their legs down before she said they could, she hit them. Occasionally, defendant came into their bedroom at night, woke them up by hitting them, and made them clean the bathroom. They got hit for not vacuuming properly, for not going to bed on time, for staying awake after going to bed, and for not washing the dishes properly. If they screamed while being hit, defendant would gag them with a towel or a sock. Defendant told them she hated them and had to hit them every time she looked at them. Every time they walked past defendant, she hit them with a fist. At times, defendant would have to stop hitting them in order to ice down her hand. Occasionally, she would tell them to stay away from her for awhile so she could calm down.

[footnote continued from previous page]

At some point, the boys finally told their father about the abuse. He apparently confronted defendant about it, which caused her to hit them even more for telling on her. After that, they did not tell anyone else. They were afraid to tell their mother anything during their telephone conversations because defendant listened in on the conversations.

In late March 2000, the youngest boy's teacher noticed that he had scratches on the back of his neck. The teacher reported the injuries to child protective services, but there was no immediate response because it was not deemed an emergency situation. Around the same time, one of the other teachers held a parent-teacher conference to discuss recent negative changes in the boys' behavior. Defendant seemed angry about having to come in for the conference.

That night, defendant announced "Let the games begin," and spent a long time beating the boys with a drumstick. The boys testified that that was the worst beating they had received. Defendant hit them all night until it was time for bed. The next day, it was so painful to get dressed that the boys had to help each other and cried as they got dressed.

At school, the youngest boy's teacher noticed that he was moving slowly and in severe pain. The police were immediately contacted. Both boys were taken to the police station and then to the hospital for examination. The boys were in so much pain that they had to be helped out of their clothes. They both had similar bruising and swelling covering their torsos and extremities. Some of the wounds were consistent with a blow

from a looped cord or belt, some were consistent with a blow from a drumstick, and some were fresh.

Defendant was prosecuted for abusing the boys and found guilty of two counts of torture (§ 206) and two counts of child abuse resulting in great bodily injury (§§ 273a, subd. (a), 12022.7, subd. (a)). Defendant was sentenced to two concurrent life terms for the torture convictions and two concurrent terms of seven years for the child abuse convictions which were ultimately stayed pursuant to section 654.

DISCUSSION

1. *Witness's Assertion of Fifth Amendment Privilege*

During trial, a hearing was held outside the presence of the jury to see whether the boys' father would assert his Fifth Amendment privilege against self-incrimination. At the hearing, the father testified about his relationship with the children and their mother, and how he once lived with them in Mississippi. However, the father refused to testify about whether he had ever punished his children, whether he caused their current injuries, or whether he considered them to be discipline problems, and refused to say whether he ever lived with the children during the time they were abused. The father also asserted the privilege when asked about initially picking the children up and taking them to California, but the privilege was overruled as to those questions.

The trial court allowed the defense to call the father as a witness on the unprivileged matters, but refused to allow defense counsel to question the father about the privileged subject matter. Anticipating that privileged matters would nonetheless

arise, the trial court attempted to sanitize any assertion of privilege by instructing the father to refer to "Evidence Code section 940," the statutory privilege against self-incrimination, rather than the more recognizable "Fifth Amendment." The jury instructions were similarly sanitized by the use of CALJIC No. 2.26, the generic privilege instruction, rather than CALJIC No. 2.25, which specifically refers to the privilege against self-incrimination.

Despite the limitations on the father's testimony, defense counsel called the father as a defense witness and persisted in inquiring into privileged matters, thereby eliciting frequent assertions of the aforementioned statutory privilege. On appeal, defendant argues that the jury should have been specifically informed that the father had invoked the privilege against self-incrimination, rather than allowing the invocation of a generic-sounding statutory privilege.

Defendant's argument is contrary to well-established law. As defendant readily admits, juries are not permitted to infer *anything* from a witness's exercise of the Fifth Amendment privilege against self-incrimination. (Evid. Code, § 913; *People v. Mincey* (1992) 2 Cal.4th 408, 441.) This is because "[a] person may invoke the constitutional privilege against self-incrimination for a reason other than guilt. The privilege may be asserted, for example, simply to insure that the prosecution against a person charged with a crime is not helped by that person's own statements. Thus, inferring guilt from the mere exercise of the privilege would be improper and is at best based on speculation, not evidence." (*Mincey*, at p. 441.) In order to enforce this rule, California courts have long

advocated the sort of pre-trial evidentiary hearing that occurred in this case, where a witness is given the opportunity to invoke the privilege outside the hearing of the jury. (See *id.* at pp. 441-442.) Once that occurs, the parties do not have a right to force the witness to invoke the privilege a second time in the presence of the jury, and if the jury learns about the invocation of the privilege, the court is required to instruct them not to draw any inferences from it. (*Ibid*.)

In light of these well-established rules, it is difficult to imagine any rationale for taking the extraordinary step of informing a properly uninformed jury that the privilege against self-incrimination had been invoked. Nevertheless, defendant argues that this case warrants such a drastic step because this jury may have inferred her guilt from the father's assertion of the generic-sounding statutory privilege. Defendant's argument takes this form: There was some evidence that the father lived with defendant, which may have caused the jury to infer that the father and defendant were married, which may have caused the jury to infer that the father was invoking some type of marital privilege, which may have caused the jury to infer that he invoked the privilege in order to protect defendant, which may have caused the jury to infer that defendant was guilty.

There are several good reasons to reject this argument, not the least of which is the absurdly attenuated chain of reasoning necessary to reach the inference of guilt. First, defendant's argument would require us to violate another clearly established rule of law by presuming that the jury ignored the instruction to not draw any inferences from the assertion of privilege. (CALJIC No. 2.26.) Second, defendant's argument would merely

replace one improper inference with another. Third, the Supreme Court has already rejected a similar argument under analogous circumstances. In *People v. Cudjo* (1993) 6 Cal.4th 585, the prosecution was permitted to use the transcript of a witness's preliminary hearing testimony because the witness invoked the privilege against self-incrimination outside the presence of the jury and was therefore deemed unavailable. The defendant argued that the jury should have been informed that the witness had invoked the privilege, but the *People v. Cudjo* court rejected that argument, asserting that "permitting the jury to learn that a witness has invoked the privilege against self-incrimination serves no legitimate purpose." (*Id*. at p. 619.) Similarly, no legitimate purpose would have been served by informing this jury that the father had asserted the privilege against self-incrimination.

2. *Jury Instructions: Definition of Persuasion*

Defendant was charged with and ultimately found guilty of two counts of torture, which requires the infliction of great bodily injury "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (§ 206.) During deliberations, the jury asked the court to define "revenge, persuasion, sadistic purpose." The court responded that "[s]adistic purpose means the infliction of pain on another person for the purpose of experiencing pleasure. [¶] Revenge and persuasion have their common meanings."

Defendant argues that the court should have told the jury to read the term "persuasion" in light of the term "sadistic purpose" in order to distinguish torture from

lesser forms of child abuse that may also involve persuasion. According to defendant, the common meaning of persuasion may mislead a jury into believing that torture occurs whenever excessive physical discipline is employed in a misguided attempt to "persuade" a child to follow the rules.

This argument fails because no jury would confuse child abuse with torture simply because the defendant wanted to persuade the child victim to follow the rules. The principle distinction between the lesser forms of child abuse and torture is the gravity and maliciousness of the abuse, not the offender's purpose. Torture requires the actual infliction of great bodily injury with the specific intent to cause "extreme" pain and suffering (§ 206); the lesser forms of child abuse, on the other hand, merely require the infliction of "unjustifiable" pain and suffering under circumstances "likely" to cause great bodily injury (§§ 273a, 273ab). Therefore, when there is no great bodily injury or no intent to cause extreme pain, no jury is going to call it torture simply because they were confused by the offender's persuasive purpose.

Furthermore, even if the term "persuasion" were somewhat confusing in this context, we have no idea what persuasion might mean if it does not mean what it commonly means. Rather than offer a coherent alternative definition for "persuasion," defendant merely proposes that it be "read in light of the term sadistic purpose, and not just persuasion in and of itself." But that is meaningless gibberish; persuasion and sadism have nothing to do with each other. It may be possible to link persuasion and sadism in a sort of "sadistically persuasive" requirement. But that makes little sense and

is contrary to the torture statute, which merely requires proof of one or the other, not both. (§ 206.) So we are left with a choice between a commonly understood definition or defendant's utterly incomprehensible, and possibly improper, alternative. Faced with that choice, we do not hesitate to join the trial court in selecting the common definition.

As an aside, defendant's reliance on *People v. Steger* (1976) 16 Cal.3d 539 (*Steger*) is misplaced. In *Steger*, the defendant beat a child to death, resulting in a conviction for murder by torture. (*Id*. at p. 543.) *Steger* initially determined that because murder by torture was murder in the first degree, it required proof of a willful, deliberate, and premeditated intent to cause extreme and prolonged pain. (*Id*. at p. 546.) *Steger* then reversed the defendant's conviction, concluding that her actions were merely a "misguided, irrational and totally unjustifiable attempt at discipline" by a woman "continually frustrated by her inability to control her stepchild's behavior," not the sort of calculated, cold-blooded actions justifying a conviction for premeditated and deliberate murder. (*Id*. at p. 548.) Thus, *Steger* turned solely on the first degree murder element of premeditation and deliberation, an element that is not required for section 206 torture. (*People v. Vital* (1996) 45 Cal.App.4th 441, 443-445.) *Steger* said nothing about persuasion and therefore has no bearing on the instant case.

DISPOSITION

The judgment is affirmed.

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/s/ McKinster
Acting P. J.

We concur:

/s/ Richli
J.

/s/ Ward
J.